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PEMBINAAN JAYA ZIRA SDN BHD v. MP BERSATU MEGA SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
HASNAH MOHAMMED HASHIM JCA
B RHODZARIAH BUJANG JCA
[APPEALS NO: B-02(NCC)(A)-1679-08-2017 & B-02(IM)-191-01-2018]
25 FEBRUARY 2019

C ***CONTRACT:*** *Assignment – Consent – Development agreement between Putrajaya Holdings and developer – Subsequent assignment of all obligations under development agreement by developer to plaintiff – Whether consent of Putrajaya Holdings material – Whether novation agreement between Putrajaya Holdings, developer and plaintiff override deed of assignment – Whether deed of assignment valid*

D The appeals herein arose from the decisions of two different High Courts but both concerned the same dispute between the parties. Putrajaya Holdings awarded a development project to the respondent ('defendant'), pursuant to which a development agreement was executed. Consequent to financial difficulties, the defendant, by a deed of assignment, assigned all its E obligations under the development agreement to the plaintiff for a total consideration of RM23 million. The parties executed a contract of assignment agreement ('CAA') and under cl. 1, a schedule of payments had been agreed upon. Subsequent to the execution of the deed of assignment and the CAA, Putrajaya Holdings entered into a novation agreement with the F plaintiff and the defendant in which it was agreed that the plaintiff stepped into the shoes of the defendant in respect of the project. It was the defendant's contention that the plaintiff had refused and/or neglected to pay the last two remaining payments which prompted the defendant to issue a notice under s. 218 of the Companies Act 1965 ('s. 218 notice') demanding a total G payment of RM13,763,221.70 from the plaintiff. The plaintiff, in turn, filed an originating summons ('OS') for an injunction against the filing of a winding-up petition, which was dismissed, the subject matter of the first appeal herein ('Appeal 1679'). The plaintiff also filed another OS against the defendant to declare, *inter alia*, that the CAA and all the related agreement or documents thereto were void and of no effect as well as for a refund of H the monies paid under the CAA. The OS was also dismissed and it led to the second appeal herein ('Appeal 191'). Before the filing of the OS, the plaintiff filed an interpleader summons against the defendant and Small Medium Enterprise Development Bank Sdn Bhd ('SME Bank') for the court's direction as to which one of the named defendants should the payment under I the CAA be made to. The interpleader summons was filed by the plaintiff because the bank had filed a garnishee proceeding against it based on a judgment obtained by the SME Bank against the defendant. In the midst of the proceedings, the defendant was wound up on an application unrelated to

the present dispute and consequently, the plaintiff withdrew the interpleader summons. However, the garnishee proceedings proceeded but was dismissed. Despite the plaintiff's withdrawal of the interpleader summons, the defendant contended that it had significant adverse effect on the plaintiff's *Fortuna* injunction application because in its affidavit in support of the application, the plaintiff's director, one Dato' Adi Munawar ('Dato' Adi') had affirmed an affidavit admitting its liability to pay the disputed sum under the CAA. The issue in the appeals herein concerned the consent of Putrajaya Holdings for the assignment of the project by the defendant to the plaintiff which was never obtained at the material time. The High Court Judge ('HCJ') held that since Putrajaya Holdings was a party to the novation agreement, the issue of its consent did not arise because, by virtue of it being a party, it had expressly consented to the defendant assigning or novating all the rights, titles and interests under the development agreement to the plaintiff. The HCJ also considered the fact that the plaintiff and defendant had entered into a supplementary agreement in which the intention of the parties was that the novation agreement would override the deed of assignment. The plaintiff was therefore estopped from disputing the CAA and all the underlying agreements, especially since Dato' Adi had, in the affidavit, admitted its liability to pay the sum under the CAA.

Held (allowing appeals)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) The HCJ fell into error in finding that Putrajaya Holdings' consent was not an issue because it had executed the novation agreement with the plaintiff and the defendant and in deciding that the Federal Court's decision in *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa & Pustaka* ('*Merita*') did not apply in this case. From the *ratio* of *Merita*, it was obvious that the assignment of the development agreement by the defendant to the plaintiff as per the deed of assignment, the CAA and consequently, the supplementary agreement, which was predicated upon the said deed, was void due to the non-fulfilment of the condition precedent on consent from Putrajaya Holdings in the said clause. There was clear legal distinction between an assignment and a novation. The fact that Putrajaya Holdings had agreed to the novation of the development agreement did not have the legal effect of a retrospective consent to the assignment especially in the absence of any affidavit evidence from Putrajaya Holdings to explain why no such consent was given by it. (paras 16 & 18)

(2) As the deed was found to be null and void, the admission of owning the disputed amount by Dato' Adi would not carry any weight at all to the prejudice of the plaintiff or act as an estoppel pursuant to s. 31 of the Evidence Act 1950. The law does not mandate the raising of the

estoppel once an admission was made. Furthermore, Dato' Adi had also explained that the admission was made under the mistaken belief that the agreement was valid. In the clear face of the invalidity of the assignment based on the *ratio* in *Merita*, the explanation by Dato' Adi could not be summarily rejected. (para 19)

(3) Consequently, Appeal 191 was allowed to declare the CAA and its related agreement null and void. However, the refund of the amount of RM9,399,682.34 was not allowed and the matter was ordered to be remitted to the High Court to determine the amount of restitution to be paid to the plaintiff. The court opined that, although the total amount paid was not to be refunded to the plaintiff, it did not mean that there were no legitimate expenses incurred by the defendant at all following the assignment. Hence, it was only fair that the amount due be assessed by the High Court. Consequently, Appeal 1679 was also allowed as it is trite law that where there is a *bona fide* dispute as to the debt on substantial grounds, a *Fortuna* injunction should be granted. (paras 21 & 22)

(4) The defendant had also raised a technical objection that the plaintiff's OS was defective because of non-compliance under O. 7 r. 3(1) and (2) of the Rules of the Court 2012 ('ROC') as it did not state in its intitulement the specific subsection of s. 34 of the Specific Relief Act 1950 upon which the prayers were made and nor did it include a concise statement of the reliefs and particulars upon which the cause of action was predicated upon. However, the omissions were not prejudicial against the defendant as it was able to file an affidavit to oppose the application and was curable under O. 2 r. 1 in view of O. 1A of the ROC. (para 20)

Bahasa Malaysia *Headnotes*

Rayuan-rayuan ini timbul daripada keputusan dua Mahkamah Tinggi berlainan tetapi kedua-duanya berkait dengan pertikaian yang sama antara pihak-pihak. Putrajaya Holdings mengawardkan satu projek pembangunan kepada responden ('defendan') dan berikutan itu, satu perjanjian pembangunan dimeterai. Akibat masalah kewangan, defendan, melalui surat ikatan penyerahhakan, menyerahkan kesemua tanggungjawabnya bawah perjanjian pembangunan tersebut kepada plaintif untuk balasan berjumlah RM23 juta. Pihak-pihak menandatangani perjanjian kontrak penyerahhakan ('CAA') dan bawah kl. 1, satu jadual bayaran disetujui. Selepas pemeteraian surat ikatan penyerahhakan dan CAA, Putrajaya Holdings memasuki satu perjanjian novasi dengan plaintif dan defendan dan disetujui bahawa plaintif mengambil tempat defendan berkaitan dengan projek tersebut. Defendan menghujahkan plaintif enggan dan/atau ingkar membayar dua bayaran terakhir menyebabkan defendan mengeluarkan notis bawah s. 218 Akta

Syarikat 1965 ('notis s. 218') menuntut bayaran berjumlah RM13,763,221.70 daripada plaintif. Sebaliknya, plaintif memfailkan saman pemula ('SP') untuk injunksi terhadap pemfailan petisyen penggulungan, yang ditolak, hal perkara rayuan pertama ('Rayuan 1679'). Plaintif juga memfailkan satu lagi SP terhadap defendan untuk mengisytiharkan, antara lain, bahawa CAA dan kesemua perjanjian atau dokumen-dokumen berkaitan dengannya batal dan tiada kesan serta pemulangan kesemua wang yang dibayar bawah CAA. Saman pemula tersebut juga ditolak menjurus pada rayuan kedua ini ('Rayuan 191'). Sebelum pemfailan SP, plaintif memfailkan saman interplider terhadap defendan dan Small Medium Enterprise Development Bank Sdn Bhd ('Bank SME') untuk arahan mahkamah kepada defendan yang mana satu bayaran bawah CAA perlu dibuat. Saman interplider tersebut difailkan oleh plaintif kerana bank telah memfailkan prosiding garnisan terhadapnya berdasarkan penghakiman yang diperoleh Bank SME terhadap defendan. Semasa prosiding tersebut berjalan, defendan digulung atas permohonan yang tidak berkait dengan pertikaian ini dan akibatnya, plaintif menarik balik saman interplider. Walau bagaimanapun, prosiding garnisan diteruskan tetapi ditolak. Walaupun saman interplider plaintif ditarik balik, defendan menghujahkan terdapat kesan memudaratkan ketara atas permohonan injunksi *Fortuna* plaintif kerana dalam afidavitnya menyokong permohonan, pengarah plaintif, bernama Dato' Adi Munawar ('Dato' Adi') mengikrarkan afidavit mengakui liabiliti untuk membayar jumlah yang dipertikaikan bawah CAA. Isu dalam rayuan-rayuan ini berkait dengan persetujuan Putrajaya Holdings, untuk penyerahhakan projek oleh defendan kepada plaintif, yang tidak pernah diperoleh pada masa material. Hakim Mahkamah Tinggi ('HMT') memutuskan bahawa oleh sebab Putrajaya Holdings adalah pihak dalam perjanjian novasi, isu tentang persetujuan tidak timbul kerana, dengan menjadi pihak, Putrajaya Holdings memberi persetujuan secara langsung kepada defendan menyerahkan atau novasi kesemua hak, hak milik dan kepentingannya dalam perjanjian pembangunan kepada plaintif. Hakim Mahkamah Tinggi juga mempertimbangkan fakta bahawa plaintif dan defendan memasuki perjanjian tambahan dan niat pihak-pihak adalah agar perjanjian novasi mengatasi perjanjian penyerahhakan, khususnya apabila Dato' Adi, dalam afidavitnya, mengakui liabiliti untuk membayar jumlah bawah CAA.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Rhodzariah Bujang HMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi terkhilaf apabila mendapati persetujuan Putrajaya Holdings bukan satu isu kerana telah menandatangani perjanjian novasi dengan plaintif dan defendan dan memutuskan keputusan Mahkamah Persekutuan dalam kes *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa & Pustaka* ('*Merita*') tidak terpakai dalam kes ini. Daripada *ratio* kes *Merita*, jelas bahawa penyerahhakan perjanjian pembangunan oleh defendan kepada plaintif seperti dalam surat ikatan

penyerahhakan, CAA dan berikutan itu, perjanjian tambahan, berdasarkan surat ikatan tersebut terbatal kerana tidak memenuhi syarat awalan persetujuan daripada Putrajaya Holdings dalam klausa tersebut. Terdapat perbezaan jelas dari segi undang-undang antara penyerahhakan dan novasi. Fakta bahawa Putrajaya Holdings bersetuju dengan novasi perjanjian pembangunan tidak mempunyai kesan undang-undang untuk persetujuan retrospektif penyerahhakan khususnya tanpa keterangan afidavit daripada Putrajaya Holdings menjelaskan mengapa persetujuan tidak diberi.

(2) Oleh sebab surat ikatan tersebut didapati terbatal dan tidak sah, pengakuan Dato' Adi mengenai tanggungan jumlah yang dipertikaikan tiada kesan yang memudaratkan plaintif atau sebagai estopel menurut s. 31 Akta Keterangan 1950. Undang-undang tidak memberi mandat untuk membangkitkan estopel jika pengakuan dibuat. Tambahan lagi, Dato' Adi juga telah menjelaskan bahawa pengakuan tersebut dibuat atas kesilapan mempercayai perjanjian tersebut sah. Berdasarkan ketaksahan jelas penyerahhakan berdasarkan *ratio* dalam *Merita*, penjelasan Dato' Adi tidak boleh ditolak terus.

(3) Dengan itu, Rayuan 191 dibenarkan untuk mengisytiharkan CAA dan perjanjian yang berkaitan dengannya terbatal dan tidak sah. Walau bagaimanapun, pemulangan jumlah RM9,399,682.34 tidak dibenarkan dan perkara tersebut diperintahkan dikembalikan ke Mahkamah Tinggi untuk menentukan jumlah restitusi yang perlu dibayar kepada plaintif. Mahkamah berpendapat bahawa walaupun jumlah keseluruhan yang dibayar tidak akan dikembalikan kepada plaintif, itu tidak bermaksud tiada perbelanjaan sah oleh defendan berikutan penyerahhakan. Oleh itu, adalah wajar jumlah tersebut ditaksir oleh Mahkamah Tinggi. Berikutan itu, Rayuan 1679 juga dibenarkan kerana undang-undang matan bahawa apabila terdapat pertikaian *bona fide* mengenai hutang atas alasan substansial, injunksi *Fortuna* wajar dibenarkan.

(4) Defendan juga membangkitkan bantahan teknikal bahawa SP plaintif cacat kerana ketidakpatuhan A. 7 k. 3(1) dan (2) Kaedah-kaedah Mahkamah 2012 ('KKM') kerana tidak menyatakan dalam tajuknya sub-seksyen spesifik s. 34 Akta Relief Spesifik 1950 yang menjadi asas permohonan dibuat dan juga tidak memasukkan pernyataan ringkas dan padat relief-relief dan butir-butir yang menjadi asas kausa tindakan. Walau bagaimanapun, peninggalan tersebut tidak memprejudis defendan kerana defendan masih boleh memfailkan afidavit menentang permohonan dan kecacatan itu boleh dibetulkan bawah A. 2 k. 1 berdasarkan A. 1A KKM.

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

H&R Johnson Tiles Ltd & Anor v. H&R Johnson (M) Bhd [1998] 1 LNS 662 HC ***(refd)***

Housing and Development Board v. Lee Sem Yoong Sdn Bhd [1987] 1 LNS 30 SC ***(refd)***

Merita Merchant Bank Singapore Ltd v. Dewan Bahasa & Pustaka [2014] 9 CLJ 1064 FC ***(refd)***

Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)
Companies Act 1965, s. 218
Contracts Act 1950, s. 63
Evidence Act 1950, s. 31
Rules of Court 2012, O. 1A, O. 2 r. 1, O. 7 r. 3(1), (2)
Specific Relief Act 1950, s. 34

(Appeal No: B-02(NCC)(A)-1679-08-2017)
For the appellant - Abu Aziz; M/s Amelda Fuad Abi & Aidil
For the respondent - Shobah Veera, Samarudin Rejab, Vinod Sharma & N Rajentharan; M/s Hakem Arabi & Assocs

(Appeal No: B-02(IM)-191-01-2018)
For the appellant - Malik Imtiaz Sarwar, Khoo Suk Chyi, Amelda Md Din, K Selva Kumaran & Abu Haziq Abu Talib; M/s Malik Imtiaz Sarwar
For the respondent - Shobah Veera, Samarudin Rejab, Vinod Sharma & N Rajentharan; M/s Hakem Arabi & Assocs

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons No: BA-24NCC-5-01-2017 (overruled).]

Reported by S Barathi

JUDGMENT

Rhodzariah Bujang JCA:

Introduction

[1] These two appeals, though heard together, arose from the decisions of two different High Courts but both concern the same dispute between the parties which was centered on the construction of 650 units of apartment for civil servants at Precinct 11, Putrajaya called 'Pangsapuri Melinjau' ("the project"). The project was awarded by Putrajaya Holdings to the respondent (defendant in the High Court) *vide* a letter of award dated 22 October 2013 and pursuant to which, a development agreement dated 26 September 2014 was executed by the parties. The appellant (plaintiff in the High Court) in turn came into the picture after it took over the project from the respondent, the details of which will be mentioned shortly. For ease of reference, the parties would be referred to in this judgment as they were in the High Court.

A **Assignment Of Contract**

[2] It was an undisputed fact that the defendant's financial difficulties stood in its way to complete the project and which was why it had, by a deed of assignment dated 28 November 2014, and barely two months after the execution of the development agreement with Putrajaya Holdings, assigned
B all its obligations under the aforesaid development agreement to the plaintiff for a total consideration of RM23 million. A contract of assignment agreement ("the CAA") of the even date was similarly executed by the parties. Under cl. 1 of the CAA, the parties have agreed on a schedule of payments for the sum of RM19,567,446.66, out of RM 23 million, given that
C prior to the execution of these agreements, a sum of RM1,950,000 had been paid to the defendant and a further sum of RM1,482,503.34 paid to the defendant's creditor (Maxprom Bina Sdn Bhd) on 19 November 2014. The said payment schedule reads:

D (i) RM1,000,000 upon the execution of the CAA;

(ii) RM5,000,000 upon the issuance of a letter of offer by a financial institution to the plaintiff confirming to finance the project;

(iii) RM11,800,000 upon the disbursement of the first drawdown of the financing facility by the said institution; and

E (iv) Final remaining balance of RM1,767,496.66 upon the issuance of the certificate of completion and compliance for the project.

[3] Under cl. 1.5 of the CAA, the plaintiff was also required to pay the defendant for the materials on site as well as for preliminary work done for
F the project within one month from the receipt of invoices for such costs from the defendant. The plaintiff did obtain financing for the project from Bank Pembangunan Malaysia Berhad and the first drawdown of the financing facility was approved on 17 September 2015.

[4] The defendant contended that the plaintiff had refused and/or
G neglected to pay the last two remaining payments listed above which prompted it to issue a notice dated 16 January 2017 under s. 218 of the Companies Act 1965 ("s. 218 notice") demanding the total payment of RM13,763,221.70 from the plaintiff. This caused the plaintiff to file an originating summons ("OS") in the High Court of Shah Alam seeking an
H injunction against the filing of a winding-up petition ('*Fortuna* injunction') which was dismissed by Mohd Yazid bin Mustafa J. That decision is the earlier of the two appeals before us, that is Appeal No. B-02(NCC)(A)-1679-08/2017 ("Appeal No. 1679").

[5] On 18 May 2017 the plaintiff also filed another OS, which was
I subsequently amended on 12 September 2017, against the defendant to declare, *inter alia*, that the CAA and all the related agreement or documents thereto void and of no effect as well as for a refund of the monies paid under

the CAA. There were also two other prayers in the amended OS in relation to the s. 218 notice and an injunction to restrain the defendant from taking legal proceedings in relations to the CAA but these prayers were withdrawn at the hearing of the said OS. This OS was dismissed by Datuk Azimah binti Omar J on 19 January 2018 which therefore led to the filing of the second appeal before us, that is Appeal No. B-02(IM)-191-01/2018 ("Appeal No. 191").

[6] The above two legal actions were by no means the only court proceedings pertaining to the project. The plaintiff had in fact in 2015 before the filing of the above-mentioned OS filed an interpleader summons against the defendant and Small Medium Enterprise Development Bank Malaysia Sdn Bhd as it was not sure to whom the sum of RM11,298,219.03 under the CAA should be paid to, thus necessitating the court's direction as to which one of the named defendants it should be made. This interpleader summons was filed by the plaintiff because the said bank had filed a garnishee proceeding against it based on a judgment obtained by the said bank against the defendant (in its former name Maha Persada Capital Sdn Bhd) and two others, Dato' Yusof bin A Bakar @ Md Talib and Dato' Yusni bin Meon. The defendant's application to intervene in the said garnishee proceeding was dismissed by the High Court on 27 January 2016. It had taken the stand that the garnishee order was void for having stated its company's registration number incorrectly. However, this mistake was subsequently corrected by an application to amend the same.

[7] In the midst of these proceedings, the defendant was wound up by an order of the High Court dated 13 November 2015 on application by one Borhan bin Mohd Doya for a judgment obtained by him in respect of a loan which was unrelated to this dispute. Pursuant to that order, an official receiver from the Department of Insolvency was appointed by the court. In the statement of affairs, the defendant named the plaintiff as one of its debtors. By reason of that winding-up order, the plaintiff withdrew its interpleader summons. As for the garnishee proceedings, despite the objection of the official receiver, the said hearing proceeded but was dismissed by the learned Senior Assistant Registrar on 3 May 2016 which decision was subsequently affirmed by the learned High Court Judge. Despite the plaintiff's withdrawal of that interpleader summons, the defendant contended that it has significant adverse effect on the plaintiff's *Fortuna* injunction application because in its affidavit in support of the application, the plaintiff's director, one Dato' Adi Munawar bin Hj Md Din ("Dato' Adi") had affirmed an affidavit admitting its liability to pay the disputed sum under the CAA at paras. 10 and 17 thereof (see tab 28 of core bundle of document) which are reproduced below:

> 10. Setakat tarikh Saman Pemula ini difailkan selaras dengan peruntukan CA, Plaintif telah pun menjelaskan sejumlah Ringgit Malaysia: Sembilan Juta Enam Ratus Dua Puluh Lapan Ribu Dua Ratus Dua Puluh Lapan dan Sen Tiga Puluh Empat (RM9,628,228.34) kepada Defendan Pertama.

A Ini bermaksud di bawah CA masih terdapat sejumlah Ringgit Malaysia: Tiga Belas Juta Tujuh Ratus Enam Puluh Tiga Dua Ratus Dua Puluh Satu dan Sen dan Sen Tujuh Puluh (RM13,763,221.70) yang perlu dijelaskan kepada Defendan Pertama **dan Ringgit Malaysia: Sebelas Juta Lapan Ratus Ribu (RM11,800,000.00) daripadanya adalah kini terakru**.

B 17. Saya ingin menyatakan disini bahawa pengeluaran pertama pembiayaan telah dibuat oleh BPMB pada 17.9.2019, **dan ini sekali gus memberi efek kepada tanggungan Plaintif untuk membuat pembayaran berjumlah Ringgit Malaysia: Sebelas Juta Lapan Ratus Ribu (RM11,800,000.00) kepada Defendan Pertama menurut peruntukan CA tersebut**. Namun begitu saya telah dinasihati oleh peguamcara saya, yang
C mana saya sesungguhnya percaya adalah benar, bahawa sekiranya Plaintif membuat pembayaran berjumlah Ringgit Malaysia: Sebelas Juta Lapan Ratus Ribu (RM 11,800,000.00) atau mana-mana bahagian daripada jumlah Ringgit Malaysia: Sebelas Juta Lapan Ratus Ribu (RM11,8000,000.00) kepada Defendan Pertama, ianya berkemungkinan besar akan menimbulkan satu tanggungan Plaintif terhadap kegagalan
D untuk mematuhi perintah mahkamah sepertimana yang dinyatakan di dalam perintah Garnisi tersebut. (emphasis added).

[8] Keeping this admission in abeyance for a moment, we need to state at the outset that in our view, the resolution of these two appeals lies in the central issue pertaining to the validity of the assignment of the development
E agreement to the plaintiff which is Appeal No 191 for should it be decided in favour of the plaintiff, the decision in Appeal No 1679 would consequently follow suit.

The Core Issue

F **[9]** This issue is centered on the consent by Putrajaya Holdings for the assignment of the project by the defendant to the plaintiff which was never obtained at that relevant and material time. What Putrajaya Holdings did subsequent to the execution of the deed of assignment and CAA was to enter into a novation agreement with the plaintiff and defendant on 30 December
G 2014 in which it was agreed, to put it simply, that the plaintiff stepped into the shoes of the defendant in respect of the project. On the very same date as this novation agreement, both the plaintiff and the defendant entered into a supplementary contract agreement ("supplementary agreement"). In recital 5 thereof, it is stated that Putrajaya Holdings "… has requested that the above-mentioned deed of assignment be replaced and substituted with a
H novation agreement to be executed …" by the parties therein. In cl. 1.1, the consideration for the supplementary agreement is stated as payment of "… all the monies as stipulated in cl. 1.1 to 1.6 of the contract agreement." Then in cl. 2.3 it states that references to the deed of assignment in the contract agreement "… prior to this supplementary contract assignment agreement
I shall mean to refer to the novation agreement".

[10] Coming back to the issue of Putrajaya Holding's consent, we must first mention that relevant to it is cl. 27 of the development agreement in which the parties have agreed on the appointment of a substituted entity and the consequences of such an appointment. The said clause reads as follows:

CLAUSE 27

SUBSTITUTED ENTITY

27.1 Appointment of Substituted Entity

27.1.1 Perbadanan acknowledges that the Developer may grant to the Lenders, as security for the financing or refinancing of the Gross Development Costs, the rights to appoint a Substituted Entity to take over the development rights granted to the Developer pursuant to Clause 3.

27.1.2 If the Developer fails to remedy the relevant defaults in accordance with Clauses 23.1.1, or 23.2.1, then and in such event, without prejudice to any other rights it may possess, Perbadanan shall give notice in writing to the Developer, that it may terminate this Agreement unless within a period of sixty (60) days after the date of such notice, the Lenders nominate a company which satisfies the conditions set out in Clause 27.2 (such company shall hereinafter be referred to as the "Substituted Entity"). If the Lenders nominate a Substituted Entity within the period as aforesaid or within such longer period as Perbadanan may approve, the Parties shall enter into such agreements as may be necessary to effect the substitution.

27.2 Substituted Entity

For the purpose of Clause 27.1, a Substituted Entity shall satisfy the following conditions:

(a) The company has been approved by Perbadanan;

(b) The company is a credible and financially viable company;

(c) Perbadanan is satisfied that the shareholding of the company conforms to the requirements laid down in applicable Government's policies from time to time; and

(d) The company possesses the expertise and competency to remedy any existing defaults of the Developer including the expertise to carry out the Project.

27.3 Effect of Appointment

If a Substituted Entity is appointed in accordance with Clause 27.1, then, with effect from the date of such appointment, the Substituted Entity shall for all purposes of this Agreement have the benefit of all rights, and shall assume all liabilities and obligations of the Developer under this Agreement and thereafter all references in this Agreement to the Developer shall be construed as references to the Substituted Entity.

[11] Then in the all-important cl. 41 on assignment, this was what the parties agreed:

> CLAUSE 41
>
> ASSIGNMENT
>
> 41.1 Permitted Assignment
>
> The Developer may assign to and create security in favour of its Lenders in respect of the followings:
>
> (a) all its rights, interest and title under this Agreement in respect of the Proceed of Sales;
>
> (b) all its rights, interest and title under this Agreement in respect of the amount payable to the Developer by Perbadanan as a result of early termination of this Agreement pursuant to Clause 24.1.2 and Clause 26A.
>
> 41.2 Other Assignment not Allowed
>
> Save as provided in Clause 41.1, the Developer shall not assign, transfer or novate this Agreement or any part of it or any interest conferred by this Agreement to any third party without prior written consent from Perbadanan and upon such terms and conditions as Perbadanan deems fit.

[12] Of course the crucial clause relied upon by the plaintiff here is cl. 41.2. The learned High Court Judge at para. [46] of Her Ladyship's judgment acknowledged that Putrajaya Holding's consent was material under the said cl. 41.2 but qualified that provision by saying in the same paragraph:

> Nonetheless, this Court must also be minded that as consequence flowing from the DA, the Plaintiff, the Defendant and also PJC had executed other agreements in relation to the novation and assignment of the rights and obligations under the DA.

[13] Her Ladyship in the next paragraph then said "cl. 41.2 must not be read solely on its own in isolation the other terms incorporated in other agreement embracing the DA."(*sic*). She then proceeded to examine the novation agreement before concluding that since Putrajaya Holdings was a party to the novation agreement, the issue of its consent under cl. 41.2 does not arise because by virtue of it being a party, it had expressly consented to the defendant assigning or novating all the rights, titles and interests under the development agreement to the plaintiff. Her Ladyship also considered the fact that the plaintiff and defendant had entered into the supplementary agreement in which the intention of the parties as spelt out in cls. 1.1, 2.1 to 2.4 was that the novation agreement would override the deed of assignment. The plaintiff was therefore estopped, said Her Ladyship, relying on *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 from disputing the CAA and all the underlying agreements especially since Dato' Adi Munawar had in the affidavit in the interpleader summons admitted its liability to pay the sum under the CAA.

[14] From the tenor of the aforesaid judgment and despite Her Ladyship's citation of the judgment of Haidar J (as he then was) in *H&R Johnson Tiles Ltd & Anor v. H&R Johnson (M) Bhd* [1998] 1 LNS 662; [1998] 4 MLJ 13 where His Lordship clearly upheld the contention of the plaintiff in the cited case that assignment of rights is wholly distinct from the circumstance of novation and could not therefore be equated, yet it appears with respect, that such an equation was made by Her Ladyship.

[15] Aside from the fact that assignment of rights are provided under two different written laws, that is, s. 4(3) of the Civil Law Act 1956 for the former and under s. 63 of the Contracts Act 1950 for the latter, the Supreme Court in *Housing and Development Board v. Lee Sem Yoong Sdn Bhd* [1987] 1 LNS 30; [1987] 2 MLJ 204 had also clearly said that there was a distinction between the two which it described as follows:

> Novation is a transaction by which a new contract is substituted for one that has already been made. Unlike assignment, novation does not involve the transfer of any property at all. It comprises (a) an annulment of one debt and (b) the creation of a substituted debt in its place. (*Re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch 52 8486)

[16] Given the clear distinction between the two, we are of the view that the learned High Court Judge fell into error when she found, as stated earlier that Putrajaya Holdings' consent was not an issue because it had executed the novation agreement with the plaintiff and the defendant. Also with respect, she was equally wrong in deciding that the Federal Court's decision in *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa & Pustaka* [2014] 9 CLJ 1064 does not apply in this case because there was no distinguishing feature in the said case with the one before her.

***Merita*'s Case (*Supra*)**

[17] Like in the case before us, there was a non-assignment clause in the two contracts executed by the respective parties for the supply of printing papers to the respondent by Benatulin Timur Sdn Bhd ("Benatulin") and these clauses provide that the contractor must obtain the written consent of Dewan Bahasa & Pustaka ("Dewan") before it can assign its rights under the agreement with the said Dewan. Benatulin had assigned certain debts due and payable by Dewan to it to the appellant, Merita Merchant Bank Singapore Ltd, who sued the said respondent for the assigned debts. It obtained judgment in the High Court which decision was reversed by the Court of Appeal. Leave to appeal to the Federal Court was granted on this question of law:

> In the assignment under Section 4(3) of the Civil Law Act 1956, whether consent of the Debtor is a legal requirement in order for the assignment to be valid in law.

The question was answered in the negative. However, in respect of the non-assignment clause, this was what the Federal Court held at paras. [31] and [32] of the judgment which we deemed fit to reproduce below:

> [31] We share the same view. On the facts of this case, we find that the non-assignment clauses appearing in both the 1996 contracts and the 1997 contract were valid and binding on both parties. The two clauses appearing in both contracts prohibiting assignment were not absolute in nature but qualified in the sense once written consent is obtained one party can still assign their rights and benefits under the contract. **The non-assignment clauses here expressly laid down that consent was a condition precedent before an assignment can be made**. In our judgment, we find that the insertion of the non-assignment clauses as a term of the contract is not in contravention of s. 4(3) of the CLA. The non-assignment clause which made consent a precondition before the debts could be assigned did not operate to invalidate the assignment contract as it was a term agreed upon by both parties when they entered into the contract. It is trite that parties are free to enter into a contract with terms and conditions as they deem fit and these terms and condition are binding on the parties who have in the first place agreed to be bound by it. **Thus, we hold that there could be no valid assignment if the element of consent under the non-assignment clause is not fulfilled**. It was a well-established principle sanctioned by the doctrine of sanctity of contract that parties who make agreement must adhere to their terms.
>
> [32] In our judgment, on the facts of this case, we are unable to accede to the arguments urged upon us by learned counsel for Merita that since a proper notice of assignment in writing had been given by Merita to DBP, it fulfilled the requirement for a valid and binding assignment to take effect under s. 4(3) of the CLA. As we have said earlier the element of consent is a prerequisite before a valid assignment can be made. *Thus, the requirement under s. 4(3) of the CLA 1956 with regard to a legal assignment only comes into play if the contract is assignable or the restriction to assign is fulfilled. In the instant case the non-assignment clauses and the element of consent thereunder formed an important term of the contract that parties have agreed. That formed the main prerequisite before the other prerequisites under s. 4(3) of the CLA could be considered*. (emphasis added).

[18] It is therefore patently obvious from the *ratio* in *Meritas*'s case (*supra*) that the assignment of the development agreement by the defendant to the plaintiff as per the deed of assignment, the CAA and consequently, the supplementary agreement which was predicated upon the said deed was void due to the non-fulfilment of the condition precedent on consent from Putrajaya Holdings in the said clause. Given the clear legal distinction between an assignment and a novation, the fact that Putrajaya Holdings has agreed to the novation of the development agreement does not have the legal effect of a retrospective consent to the said assignment especially in the absence of any affidavit evidence from Putrajaya Holdings to explain why no

such consent was given by it. The fact of the novation simply means, as rightly submitted by learned counsel for the appellant, that because of the defendant's failure to perform its obligation under the development agreement due to its financial position, under cl. 23.1.2 of the development agreement, Putrajaya Holdings was fully entitled to "… appoint another party to take one and complete the project according to the terms and conditions as it deems fit" and pursuant to cl. 27.1 as reproduced earlier, Putrajaya Holdings can appoint another developer to take over the defendant's place. This they had done through the said novation agreement. In saying all of the above, we are mindful of the fact that after the execution of the deed of assignment and CAA by the plaintiff and the defendant, both documents were forwarded to Putrajaya Holdings and by reason thereof it was aware of the same. We are equally aware that as per para. 9 of Dato' Adi's affidavit in support in the interpleader summons, he did depose that the novation agreement was actually drawn up at the suggestion of Putrajaya Holdings. The fact that Putrajaya Holdings had that knowledge or made that suggestion could not in any way be held against the plaintiff or is evidence in favour of the defendant because on the last page of the deed of assignment, right after the signing page for the authorised signatories of the plaintiff and defendant, there is a specific clause on Putrajaya's consent which was never signed. For certainty, that clause is reproduced below:

CONSENT TO ASSIGNMENT OF THE DEVELOPMENT AGREEMENT PURSUANT TO CLAUSE 41.2

Perbadanan Putrajaya hereby consents and agrees to the assignment of the Development Agreement between Assignor and Assignee. The Consent shall become effective upon full execution hereof by all parties, and **no assignment shall be deemed to have occurred between Assignor and Assignee until such execution by Perbadanan Putrajaya**.

Date :

By : PERBADANAN PUTRAJAYA

Name:

Title :

(emphasis added)

In subscribing to the view expressed above, we do acknowledge that the end and practical result of the assignment and the novation may be the same, which was the plaintiff taking over the project from the defendant but the legal consequence of not obtaining the requisite consent cannot be ignored and the doctrine of *stare decisis* dictates that the *ratio* in *Merita*'s case (*supra*) be applied here.

[19] Coming back now to the aforementioned admission of owning the disputed amount under the deed of assignment in the said affidavit of Dato' Adi, given our view that the said deed was null and void, the admission would not carry any weight at all to the prejudice of the plaintiff or act as an estoppel for s. 31 of the Evidence Act 1950 acknowledges that:

> Admissions are not conclusive proof of the matters admitted, but they **may** operate as estoppels under the provisions hereinafter contained. (emphasis added).

In other words, the law does not mandate the raising of the estoppel once an admission was made. Furthermore, Dato' Adi has also explained that the said admission was made then under the mistaken belief that the agreement was valid. In the clear face of the invalidity of that assignment by the application based on the *ratio* in *Merita's* case (*supra*), that explanation by Dato' Adi cannot be summarily rejected.

Technical Objection

[20] Before concluding, we will, for completeness mention the technical objection made by the defendant before the learned High Court Judge as well as in the submission before us, though not highlighted in the oral submission at the hearing of these appeals. The objection was that the plaintiff's OS was defective because of non-compliance under O. 7 r. 3(1) and (2) of the Rules of Court 2012 ("the ROC") as it did not state in its intitulement the specific subsection of s. 34 of the Specific Relief Act 1950 upon which the prayers are made and nor did it include a concise statement of the reliefs and particulars upon which the cause of action was predicated upon. The learned High Court Judge held in paras. 36 and 37 of her judgment that these omissions were not prejudicial against the defendant for it was able to file an affidavit to oppose the application and were curable under O. 2 r. 1 in view of O. 1A of the ROC. We said 'mention' and not address because the defendant did not file any cross-appeal against the said findings and we also happen to agree with the learned High Court Judge's reasonings as aforesaid.

[21] Premised on the above considerations, Appeal 191 is allowed as per prayer 1 of the OS which was to declare the contract assignment agreement and its related agreement null and void as well as prayer 3 which was for the refund of the amount of RM9,399,682.34 which was paid by the plaintiff to the defendant but which we did not allow as prayed. Instead, we ordered that in respect of this prayer 3, the matter be remitted to the High Court to determine the amount of restitution to be paid to the plaintiff because although we agree that the total amount paid was not to be refunded to the plaintiff, it does not mean that there were no legitimate expenses incurred by the defendant at all following the said assignment. Thus, it is only fair that the amount due be assessed by the High Court.

[22] Consequent upon the above, we also ordered that Appeal No 1679 be allowed as it is trite law that where there is a *bona fide* dispute as to the debt on substantial grounds, a *Fortuna* injunction should be granted. Our considerations in Appeal No 191 not only showed such a dispute exist but that the debt as demanded in the s. 218 notice was not even owed by the plaintiff to the defendant. It being allowed was therefore a foregone conclusion and we need not belabour ourselves with the demerits of the appeal except to say this. It goes without saying that should our reasonings for allowing Appeal No 191 be impugned, this Appeal No 1679 must also be dismissed because the s. 218 notice was issued based on the said admission of Dato' Adi that RM11,800,000 under the CAA was due and owing to the defendant by the plaintiff. In the face of such admission (which of course we had said earlier should not be held against the plaintiff and presuming that we were wrong in saying so), the contention about the solvency of the plaintiff cannot be used to grant the injunction sought because non-compliance with the timeline in the said notice to pay the debt raises a presumption that it was insolvent. It would be up to the plaintiff, at the hearing of the petition, to convince the court otherwise. As held by this court in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947; [2011] 1 AMR 685:

> [38] When the debt is clearly established it follows that the court would not in general at any rate interfere even though the company would appear to be solvent. (see *Mann v. Goldstein (supra)*. Vaisey J once said in the case of *In Re A Company* (1950) 94 SJ 369:
>
> > Rich Men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them.

Learned counsel for the plaintiff submitted the issuance of the said notice was an abuse of the court's process and that the real reason for issuing the s. 218 notice was to coerce the plaintiff to pay the disputed amount. The answer to that lies in para. [40] of the just cited case above where it was held:

> [40] *Prima facie*, a creditor who is not paid has a right to file a petition for a winding-up **whatever may be his other motives**. (see *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 950. (emphasis added).

Conclusion

[23] Thus we are of the unanimous view that both appeals be allowed and with a global cost of RM20,000 here and below. The matter was remitted to the High Court to determine the issue of restitution to the appellant under prayer 3 of the amended OS dated 12 September 2017.